NO. 22434

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES JOHN BARKHORN, JR., Appellant, vs. ADLIB ASSOCIATES, INC., a Nevada corporation, Appellee.	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF ON BEHALF OF APPELLANT CHARLES JOHN BARKHORN, JR.

FRANK D. PADGETT
BURNHAM H. GREELEY
438 Alexander Young Bldg.
Honolulu, Hawaii

Attorneys for Appellant

PADGETT, GREELEY, MARUMOTO
& AKINAKA - Of Counsel

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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ARGUMENT

I. THE OPTION AGREEMENT DID CONTAIN, AND APPELLEE DID BREACH, AN IMPLIED COVENANT OF TITLE, THEREBY ENTITLING APPELLANT TO RESCIND.

Appellee admits that a covenant of title is implied in a lease (Appellee's Brief, p. 8), but repeatedly asserts that appellant has offered no precedent that a covenant of title is implied in an option to lease.

It is a conceptual quibble to say that the covenant is "in" the lease and not "in" the option to lease where the optionor, as here, cannot deliver what he

promised. If I grant you an option to buy my bull Ferdinand, may I keep the option money if Ferdinand is a steer?

It should be no surprise that appellant has not found a precedent exactly in point. Neither has appellee. The reason is that the option agreement here is most unusual. But appellee, as did the Court below, has failed to see that the very features of the option agreement which are so unusual, give rise to an implied covenant of title.

The agreement here granted an option to lease. In view of the dearth of cases dealing with options to lease, as distinguished from options to purchase, it would appear that that fact alone makes this option agreement less than usual. But what is extraordinary is that the lease was to be "for the term of fifty-five (55) years from and after and retroactive to March 8, 1960, being the date of this instrument." (Exhibit 4, p. 2) What is more, rent under the lease was to have accrued retroactively from March 8, 1960, with the $50,000 option money to have been credited as the first six months' rent. (Exhibit 4, pp. 2-3, ¶4(b)(1))

Appellee contends that the covenant of title in the lease would have been effective only from and

after execution and delivery by appellee of the lease document. (Appellee's Brief, pp. 9-10) But the retroactiveness of the lease simply will not allow appellee such an arbitrary and convenient exception. Appellee's own express covenant of quiet enjoyment, and all of appellant's covenants, would have been effective as of March 8, 1960, as a reading of the lease form referred to and adopted in the option agreement will show. (Exhibit 4, p. 10; Exhibit 6)

Since appellee promised in the option agreement that appellant would receive a lease covenanting title effective as of March 8, 1960, appellee necessarily covenanted that on that date it had clear title to the premises to be leased. Appellee did not just offer appellant a lease of the premises; it promised him a lease of premises to which its title was clear on March 8, 1960.

But on March 8, 1960, and throughout all of the option period, Surf Associates, Inc. had a lease covering every square inch of the premises and every minute of the term which were to be exclusively appellant's under the lease he bargained for. (Exhibit 7; Record 137)

Appellant was therefore entitled to rescission of the option agreement for breach by appellee of its

implied covenant of title thereunder.

Appellee makes much, however, of the proposition that a person may contract to sell or lease land he does not own, which appellant has never questioned. But that proposition is irrelevant here. What is relevant is that there is no bar, certainly none that appellant has found, against an optionor covenanting that he has clear title to land as to which he grants an option to purchase or lease. Appellant submits that such a covenant, unusual to be sure, is implied here simply because the option here is unusual enough to require it.

II. APPELLANT EFFECTIVELY RESCINDED THE OPTION AGREEMENT AND IS ENTITLED TO RESTITUTION.

Appellee asserts that appellant, as a prerequisite to rescinding the option agreement, had to tender exercise of the option, which he did not. This assertion is inapplicable to the present facts and is bad law, in that it confuses the enforcement of an option with its rescission.

Appellee confuses rescission with actions for damages or specific performance. These remedies are inconsistent. 2 Restatement, Contracts §384. The reason is very simply expressed in 5 Williston, Contracts §683 (1961 ed.):

> Thus where a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or refusing to go on.

As already seen, appellee breached its implied covenant of title. If appellant had wished to continue with the option agreement, he would have had to have exercised his option during the prescribed period. He could not have required appellee to perform its obligations without performing his own. But appellant elected the other alternative, rescission of the agreement.

Appellee also attempts to fault appellant for failure to exercise his option, on the authority of Seeburg v. El Royale Corp., 54 Cal. App. 2d 1, 128 P. 2d 362 (1942). That case denied rescission without tender because the option gave the optionor thirty days after exercise in which to convey. It is consistent with the proposition that tender may be required to place an optionor in default and thereby to provide grounds for rescission.

Appellee, which assumes it was never in default, tries to squeeze itself within the Seeburg holding. It baldly states that, in the event the option was exercised, it had a reasonable time thereafter under the agreement

to clear its title. (Appellee's Brief, pp. 6, 10, 13) But nowhere in the agreement is there provision for so much time. (Exhibit 4, p. 10) Appellee, if appellant did exercise the option, would have been allowed only the time necessary for it to execute the lease; yet at no time during the option period did appellee cancel or attempt to cancel its lease to Surf Associates, Inc.

Appellee concedes that an optionee, without tendering performance, may rescind and obtain restitution if performance by his optionor is impossible. (Appellee's Brief, p. 13) This is the holding of Burks v. Davies, 85 Cal. 110, 24 P. 613 (1890).

The problem is that both the Court below and appellee have not realized that appellee could not have performed its bargain even if appellant had exercised his option.

Performance by appellee was impossible because it had promised appellant a lease covenanting title from and after March 8, 1960, when throughout the option period the same premises were leased to Surf Associates, Inc. Such a conflicting lease would have been a nullity.

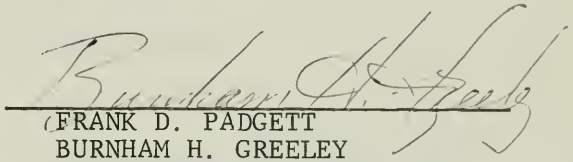
As tender would have been an empty gesture, appellant's rescission without exercise cannot bar his obtaining restitution of the $50,000 option money.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

DATED: Honolulu, Hawaii, January 31, 1969.

Respectfully submitted,



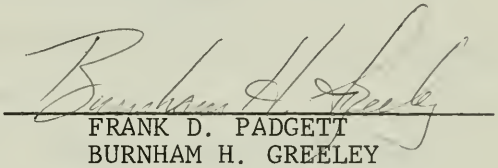
FRANK D. PADGETT
BURNHAM H. GREELEY
438 Alexander Young Bldg.
Honolulu, Hawaii

Attorneys for Appellant

PADGETT, GREELEY, MARUMOTO
& AKINAKA - Of Counsel

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



FRANK D. PADGETT
BURNHAM H. GREELEY

CERTIFICATE OF SERVICE

I certify that this brief was served upon counsel for appellee:

Marvin Osburn, Esq.
Osburn & Osburn
Suite 916, Van Nuys Building
210 West Seventh Street
Los Angeles, California 90014

by mailing three (3) copies thereof to him at his stated address on January 31, 1969.

Dated: Honolulu, Hawaii, January 31, 1969.

FRANK D. PADGETT
BURNHAM H. GREELEY